

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

CARMEN MICHELLE ALLEN,)
)
 Plaintiff,) No. 03:11-cv-00001-HU
)
vs.)
)
MICHAEL J. ASTRUE,) **FINDINGS AND RECOMMENDATION**
Commissioner of Social Security,)
)
 Defendant.)

Carmen Michelle Allen
5025 N. Vancouver Ave., #303
Portland, OR 97217

Plaintiff pro se

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HUBEL, United States Magistrate Judge:

The plaintiff Carmen Michelle Allen seeks judicial review pursuant to 42 U.S.C. § 405(g) of the Commissioner's final decision denying her applications for Disability Insurance ("DI") benefits under Title II of the Social Security Act, 42 U.S.C. § 1381 et seq., and Supplemental Security Income ("SSI") under Title XVI of the Act. Allen, appearing *pro se*¹, argues the ALJ erred in rejecting the opinion of her treating physician, and finding her testimony not to be fully credible. In addition, Allen asks the court to consider new evidence that was not presented to the ALJ or the Appeals Council. See Dkt. ## 18 & 23.

I. PROCEDURAL BACKGROUND

Allen protectively filed her applications for SSI and DI benefits on June 15, 2007, at age 46, claiming disability since June 9, 2007, due to arthritis, Lupus, obesity, a splenectomy, congestive heart failure, "hypertension - benign essential," and

¹The court notes that Allen's reply brief is signed by her and by "Cynthia Maria Theresia Hymer, Plaintiff[']s Lay Advocate." Dkt. #23, p. 10. Allen's opening brief is not signed, but her prayer for relief begins, "We pray for a reversal. . . , " leading to the assumption that Ms. Hymer also assisted her with her opening brief. Dkt. #18, p. 10. "[A]gents or other persons, other than attorneys," may represent claimants in Social Security agency proceedings if they comply with rules and regulations established by the Commissioner. 42 U.S.C. § 406(a)(1). However, only attorneys may represent parties other than themselves in this court. See LR 831(a). However, the point appears to be moot, as Hymer has not submitted any declaration or other signed document, and she appears simply to have assisted Allen in preparing her briefs. Allen was represented by counsel at the ALJ hearing. (See A.R. 26)

1 "tobacco use." (A.R. 120-35, 151²) Regarding how these
 2 limitations affect her ability to work, Allen indicated, "The lupus
 3 causes arthritis and vision problems. It prevents me from standing
 4 for more than about 10 minutes without pain, and from bending.
 5 Congestive heart failure causes me to lose my breath quickly. I
 6 cannot walk upstairs [sic]. My high blood pressure causes
 7 migraines, which makes me go to the hospital almost every week."
 8 (A.R. 151)

9 Allen's applications were denied initially and on recon-
 10 sideration. (A.R. 60-63) She requested a hearing, and a hearing
 11 was held on January 5, 2010, before an ALJ. Allen was represented
 12 by counsel at the hearing. (See A.R. 26) Allen testified on her
 13 own behalf, and a Vocational Expert ("VE") also testified. (A.R.
 14 26-59) On January 14, 2010, the ALJ issued his decision, denying
 15 Allen's applications for benefits. (A.R. 8-19) Allen appealed the
 16 ALJ's decision, and on October 27, 2010, the Appeals Council denied
 17 her request for review. (A.R. 5-7) However, the Appeals Council
 18 later set aside its earlier action "to consider additional
 19 information." (A.R. 1) The new evidence consisted of a Medical
 20 Source Statement and "Verification of Disability" provided by
 21 Dr. Caroline Orsini. (A.R. 4; 304-10) On February 21, 2011, the
 22 Appeals Council stated the new evidence did not warrant further
 23

24 ²The administrative record was filed electronically using the
 25 court's CM/ECF system. Dkt. #14 and attachments. Pages of the
 26 record contain three separate page numbers: two located at the top
 27 of the page, consisting of the CM/ECF number (e.g., Dkt. #14-3,
 28 Page 12 of 60); a Page ID#; and a page number located at the lower
 right corner of the page, representing the numbering inserted by
 the Agency. Citations herein to "A.R." refer to the agency
 numbering in the lower right corner of each page.

1 review of the ALJ's decision, and it denied Allen's request for
2 review (A.R. 1-4), making the ALJ's decision the final decision of
3 the Commissioner. 20 C.F.R. §§ 404.981, 416.1481. Allen filed a
4 timely Complaint in this court seeking judicial review of the
5 Commissioner's final decision denying her applications for
6 benefits. Dkt. #2. The matter is fully briefed, and the
7 undersigned submits the following findings and recommended
8 disposition of the case pursuant to 28 U.S.C. § 636(b)(1)(B).
9

10 ***II. FACTUAL BACKGROUND***

11 ***A. Summary of the Medical Evidence***

12 On August 20, 2006, Allen saw a doctor at an urgent care
13 clinic with a complaint of low back pain from a work-related injury
14 that had occurred eight days earlier at her job as a checker at
15 Fred Meyer. She stated she had "twisted while picking something up
16 and felt immediate low back pain." (A.R. 219) Allen denied
17 numbness, tingling, motor weakness, or incontinence, and stated she
18 had no history of prior back pain. She was taking oxycodone
19 regularly "for chronic knee pain due to arthritis in the knee," and
20 she stated the medication was somewhat helpful for her back pain,
21 but it did not relieve the pain completely. (*Id.*) On examination,
22 she exhibited tenderness in the left low back, and "some decreased
23 range of motion with forward flexion." (*Id.*) She was diagnosed
24 with a lumbar strain. She was given a work release for four days,
25 to return on the fifth day "without restriction at her request."
26 (*Id.*) She was referred to physical therapy and occupational
27 medicine for followup, and a muscle relaxant was prescribed. (*Id.*)
28

On November 15, 2006, Allen saw John R. Swartzel, M.D., her primary care doctor, with complaints of increasing pain in both knees. Allen was still working at Fred Meyer, and stated she had "great pain in the knees when climbing and descending stairs." (A.R. 217; see A.R. 204) The doctor ordered a number of laboratory tests, a routine x-ray of Allen's chest, and x-rays of her knee. Her weight was noted to be 292 pounds, and her blood pressure as 176/110. Her only current medication was Roxicet³, with no dosage shown on the record. (A.R. 204)

Allen was seen at an urgent care clinic on April 22, 2007, "because she was concerned about elevation in her blood pressure." (A.R. 217; see A.R. 208) Her primary doctor, Dr. Swartzel, had retired, so she saw a nurse practitioner at the clinic. Her blood pressure was elevated slightly at 149/92, and she was diagnosed with hypertension "and stress reaction." (A.R. 217) Laboratory tests were ordered, and medications were prescribed. (*Id.*; A.R. 208)

On June 9, 2007, Allen saw a doctor at an urgent care clinic for complaints of bilateral knee swelling. (A.R. 205, 215-16) She was diagnosed with arthritis. Lasix and oxycodone were prescribed for joint pain. (A.R. 216, 205) Notes indicate doctors believed her joint pain was "caused by a kind of arthritis called osteoarthritis, or degenerative arthritis." (A.R. 205)

On June 13, 2007, Allen saw a doctor at an urgent care clinic with complaints of "worsening shortness of breath since her last visit . . . on 6/9/07." (A.R. 214) Chest x-rays showed

³Roxicet is a pain reliever containing 5 mg of oxycodone and 325 mg of acetaminophen. See www.rxlist.com/roxicet-drug.htm.

1 "borderline cardiac enlargement without evidence of overt
 2 congesti[ve] heart failure," and no sign of pneumonia or neoplasm.
 3 (A.R. 226) The doctor's assessment was "(1) Congestive heart
 4 failure, although I do not think this is the primary cause of her
 5 shortness of breath given her very benign exam and normal BNP. (2)
 6 Shortness of breath. Normal D-dimer and normal exam dissuade from
 7 pulmonary embolus. (3) Hypertension is a clear diagnosis, pre-
 8 scribing Cozaar. (4) Allergies seasonal and perennial, prescribed
 9 loratadine." (A.R. 215) Allen was scheduled to follow up with her
 10 primary care provider on June 25, 2007. (*Id.*)

11 Allen saw family practitioner Michael P. Grace, M.D. on June
 12 25, 2007, with complaints of ongoing bilateral knee pain,
 13 congestive heart failure, and Lupus. The doctor noted the
 14 following history of Allen's conditions:

15 1) Knee arthritis: on [Tylenol 3], taking
 16 every 4 hours, taking 2. Has been on for at
 17 least one year. Was on ibuprofen in the past,
 18 did not help. Pain located [bilateral] knees,
 aches around knee caps. Aching pain, tried
 ice packs. Gets swelling in knees. Worse
 with cold, painful to go up and down stairs.
 Never had [physical therapy].

19 2) CHF: was at work, was having trouble
 20 breathing, happened 2002. Took lasix, and
 improved. Now chronically on lasix, taking
 1/day. Has [lower extremity] edema. . . . No
 21 orthopnea and no pnd [paroxysmal nocturnal
 22 dyspnea; i.e., shortness of breath and
 coughing at night]. No change in pillow
 requirement. Never had echo[cardiogram]. No
 23 [history] of asthma. Taking cozaar for [blood
 24 pressure], lasix for [lower extremity]
 swelling, and felodipine for [blood pressure].

25 3) Lupus: diagnosed 1979 in Providence in
 26 Portland. Was BB player for Portland [S]tate.
 Had "blood blisters" in mouth, and was
 27 "bleeding internally." Had low platelets, and
 by description, sounds as if she had
 sequestration of platelets by spleen and thus

1 had splenectomy. Since then, has been
 2 sensitive to bright lights. Joint pains
 3 started ~ 5 years, knees and ankles primarily
 4 as above. No known kidney problems, may have
 5 had malar rash unsure. Was on steroids for
 6 this in the past.

7 (A.R. 212)

8 On examination, Allen's heart had a regular rate and rhythm,
 9 with "no rubs, murmurs or gallops." (*Id.*) Her knees exhibited
 10 slight effusion bilaterally and patellar crepitus was noted. She
 11 had slightly limited flexion on the right, full extension
 12 bilaterally, and full flexion on the left. McMurray's test⁴ was
 13 positive bilaterally. She had no valgus or varus knee deformity,
 14 and no ACL injury. (A.R. 212-13) The doctor apparently examined
 15 previous knee x-rays which showed "[s]ome mild medial joint line
 16 narrowing, but no obvious [osteoarthritic] changes seen on AP
 17 views. Some [question] of posterior patellar changes seen on
 18 lateral views." (A.R. 213)

19 The doctor ordered new x-rays of Allen's knees, with a plan to
 20 refer her to physical therapy. He ordered laboratory tests to
 21 assess her report of Lupus, and an echocardiogram to assess her
 22 congestive heart failure. He refilled her blood pressure medica-
 23 tions, noting her blood pressure was "OK today." (*Id.*) Allen's
 24 current medications were listed as Meloxicam⁵ 15 mg, one tablet

25 ⁴"The McMurray's test . . . is used to evaluate individuals
 26 for tears in the meniscus of the knee." http://en.wikipedia.org/wiki/McMurray_test (visited 04/06/12).

27 ⁵Meloxicam is a medication used in the treatment of osteo-
 28 arthritis. See, e.g., www.rxlist.com/mobic-drug.htm.

1 twice daily; Cozaar⁶ 100 mg, one tablet per day; a diuretic, one
 2 tablet per day; acetaminophen with codeine (300/30 mg.), one to two
 3 tablets every four to six hours as needed for pain; and Felodipine⁷
 4 5 mg., once daily. She was instructed to take the acetaminophen
 5 with codeine only if she was not getting relief from the Meloxicam.
 6 (A.R. 209-11) Dr. Grace's records list the following as Allen's
 7 current medical problems, with the dates on which they were first
 8 noted, as follows:

Lupus Erythematosus-Systemic	5/21/2002
Obesity	5/21/2002
Arthritis	5/21/2002
Splenectomy	5/23/2002
Tobacco Use	8/5/2002
CHF Congestive Heart Failure	9/3/2002
Arthritis-Knee	10/8/2002
Hypertension-Benign Essential	4/1/2003
Hyperlipidemia	7/9/2007

18 (A.R. 210)

19 Bilateral standing knee x-rays taken on June 25, 2007, were
 20 compared with a similar study from March 11, 2003. The x-rays
 21 showed "minimal narrowing of the medial compartment of the left
 22 knee similar to the March 2003 study suggesting mild degenerative
 23 or posttraumatic changes to the medial meniscus." (A.R. 225)
 24

25 _____
 26 ⁶Cozaar is a medication used to treat hypertension. See
 27 <http://www.rxlist.com/cozaar-drug.htm>.

28 ⁷Felodipine is another medication used to treat hypertension.
 See, e.g. <http://www.rxlist.com/plendil-drug.htm>.

1 Laboratory test results showed a negative ANA (antinuclear
2 antibody) test; high C-reactive protein (3.1, where normal is less
3 than .9), indicating the presence of inflammation in the body; and
4 a high sedimentation rate (86, where normal is less than 21), also
5 indicating the presence of an inflammatory process. Her white
6 blood count was somewhat elevated. (A.R. 227) Her fasting glucose
7 level was slightly above normal (102, where normal is less than
8 100). (A.R. 228) Her cholesterol also was high, at 266. (A.R.
9 228-29)

10 On August 14, 2007, Allen saw Nurse Practitioner Kevin N.
11 Probst ("NP Probst") for followup. Notes indicate he had some
12 doubt regarding Lupus as her diagnosis, indicating it was
13 "[q]uestionable . . . in the past verses [sic] ITP [abnormally low
14 platelet count of unknown cause]." (A.R. 233) Allen complained of
15 weight gain, and "problems with chronic fatigue and daytime sleepi-
16 ness." (A.R. 234) She denied any pain, swelling, rashes, or
17 problems with her upper extremities. (*Id.*) Further lab tests were
18 ordered to rule out an inflammatory condition. Allen noted she had
19 been working for the past eighteen-plus years "on her feet doing
20 cashier-like work," but she recently had been "let go from her job
21 because of some health problems." (*Id.*)

22 On September 5, 2007, family practitioner Richard Alley, M.D.
23 reviewed the record and completed a Physical Residual Functional
24 Capacity Assessment form. (A.R. 262-69) He opined Allen would be
25 able to lift up to twenty pounds occasionally and ten pounds
26 frequently; stand/walk for at least two hours in an eight-hour
27 workday, with normal breaks; sit for about six hours in an eight-
28 hour workday, with normal breaks; and push/pull without other

1 limitations. He opined she should never climb ladders, ropes, or
2 scaffolds, but she could do all other types of postural activities
3 occasionally. (*Id.*) He noted Allen reported cooking, doing house-
4 hold chores, driving, and shopping with help. She stated she could
5 walk for ten minutes before having to rest; she had "constant
6 leg/hip/back/chest pain, can be up 1 hr and has [problems] with all
7 postures and positions[.]" (A.R. 269) Dr. Alley opined "this
8 level of disability is not supported by objective evidence and
9 [Allen's] statements are found partially credible." (*Id.*) He
10 noted Allen's lupus appeared to be inactive and her congestive
11 heart failure minimal. The restrictions he placed on her
12 functional abilities were based on "her obesity, patellofemoral
13 syndrome and knee [degenerative joint disease]." (*Id.*)

14 On January 7, 2008, family practitioner Neal E. Berner, M.D.
15 reviewed the record and concurred in Dr. Alley's findings. (A.R.
16 270)

17 On February 7, 2008, neurologist Jacqueline Farwell, M.D.
18 reviewed the record. (A.R. 271-73) She concurred with Dr. Alley,
19 as well, except she indicated there was "no need to limit stooping,
20 crouching, balancing, or climbing stairs." (A.R. 271) She noted
21 Allen's "reported trouble getting around in her [activities of
22 daily living] is not supported by her degree of disease." (*Id.*)

23 On August 7, 2008, Allen saw Nurse Practitioner Fernando
24 Carrillo ("NP Carrillo") at the Multnomah County Health Department
25 to establish care as a new patient. She had lost her medical
26 coverage, and had run out of her blood pressure medications and her
27 narcotic pain medication. She signed an authorization for the
28 clinic to obtain her prior medical records, to be reviewed prior to

1 any prescription for narcotics. She was advised to return in two
2 weeks for followup. (A.R. 300-01)

3 Allen saw NP Carillo again on August 21, 2008, for followup of
4 her hypertension. Notes indicate Allen was taking her medication
5 as prescribed. She was noted to be "homeless, living out of her
6 car." (A.R. 299) Allen asked if her prior records had been
7 obtained so she could renew her prescription for narcotic pain
8 medication; however, her records had not arrived, so she did not
9 receive the medication. Notes indicate if the records had not
10 arrived in two weeks, new x-rays might be obtained of Allen's
11 knees; however, Allen did not return to the clinic. (A.R. 299-300)

12 On February 3, 2009, Allen saw family practitioner Douglas
13 Lyon, M.D. to establish care. Allen reported that she had traveled
14 to Las Vegas on January 5, 2009, for her birthday. While there,
15 she had abdominal pain and was seen in the ER. She was diagnosed
16 with "gallstone pancreatitis." (A.R. 298) An attempt was made to
17 remove the stones laparoscopically, but this was unsuccessful, and
18 she ended up having an open cholecystectomy. She was in the
19 hospital for about one-and-a-half weeks. She reported feeling well
20 and eating well, with no nausea or bowel problems. Her weight was
21 noted to be 313 pounds. Dr. Lyon removed half of Allen's staples,
22 and ordered followup lab tests. Allen's scars were noted to be
23 well healed. (A.R. 298) She saw Dr. Lyon again on February 5,
24 2009, for removal of the remaining staples. (A.R. 297)

25 Allen saw Dr. Lyon on February 26, 2009, for followup of her
26 blood pressure and weight management. The doctor expected Allen to
27 be able to "return to normal activities by March 7th, 2009[,]" and
28 he recommended she return to swimming and water aerobics for

1 exercise. He also advised her to "drop by the clinic once a week
 2 for a blood pressure check." (A.R. 274) Allen's blood pressure
 3 was poorly controlled, but she had not taken one of her medications
 4 that morning. (A.R. 296) She was advised of the role her weight
 5 played in her high blood pressure, and was encouraged to exercise
 6 and lose weight. She was noted to be 5'4" tall, with a weight of
 7 304 pounds. (A.R. 296-97)

8 On March 27, 2009, Allen saw Dr. Lyon for followup. She
 9 reported "[e]xercising daily [and] feeling better." (A.R. 293)
 10 Allen "[e]xpress[ed] [a] desire to get on 'disability.'" (*Id.*) In
 11 that regard, Dr. Lyon noted, "Disability seeking behavior - patient
 12 with many skills and good education, should be able to find work,
 13 I explained to her I would not support her quest for disability."
 14 (A.R. 294)

15 Allen saw Dr. Lyon on April 24, 2009. She reported feeling
 16 well, and being in the pool "most every day." (A.R. 292) She
 17 reported having "difficulty getting around without pain." (*Id.*)
 18 Her diagnoses were listed as "Hypertension NOS," "Systemic Lupus
 19 Erythematosus," "Obesity NOS," "Anomalies of Spleen," and
 20 "Congestive Heart Failure, Unspec." (*Id.*) Notes indicate there
 21 was no suspicion that Allen was abusing her pain medications or
 22 diverting from taking them as prescribed. (A.R. 293)

23 As of November 5, 2009, Allen's medications were listed as
 24 blood pressure medications, a medication to prevent low blood
 25 potassium levels, a diuretic, Tylenol with Codeine every four to
 26 six hours as needed for pain, and ibuprofen 600 mg three times
 27 daily for inflammation. (A.R. 291)

28

1 On July 3, 2010, Dr. Orsini signed a form entitled
2 "Verification of Disability" to support Allen's receipt of housing
3 assistance under title 18 of the U.S. Code. Dr. Orsini checked
4 boxes indicating Allen "is disabled." (A.R. 304)

5 On July 27, 2010, family practitioner Caroline Orsini, M.D.
6 completed a medical source form at the request of the Social
7 Security Administration regarding Allen's functional abilities.
8 She opined Allen would be able to lift less than ten pounds
9 occasionally or frequently; stand/walk and sit, with normal breaks,
10 for less than two hours each during an eight-hour workday; twist
11 frequently, but never stoop/bend, crouch, or climb stairs or
12 ladders. (A.R. 307-08) She opined Allen could reach, including
13 overhead reaching, and perform pushing/pulling activities, but she
14 could not perform handling, fingering, or feeling activities. She
15 recommended Allen avoid even moderate exposure to extremes of heat
16 and cold, and to hazards. (A.R. 308) She opined Allen could sit
17 and stand for fifteen minutes at a time before changing positions.
18 She indicated Allen must walk around every thirty minutes, but
19 inexplicably indicated this would be for "0" minutes each time.
20 (A.R. 309) She indicated Allen needs the ability to change
21 positions from sitting to standing/walking at will, and Allen
22 sometimes would need to lie down at unpredictable intervals during
23 a work shift, as often as every thirty minutes.

24 In the section for an indication of medical findings that
25 support these recommended limitations, Dr. Orsini noted: "Xray
26 report - bilateral osteoarthritis L > R"; "Left medial collateral
27 tear"; "Large [right] effusion"; and "Bone infarct distal [left]
28 femoral shaft." (*Id.*) The doctor noted Allen has a history of

1 "lupus and arthritis affected by environment." (A.R. 310) Based
 2 on Allen's knee x-rays, the doctor opined Allen would need
 3 assistive devices for ambulation; need to elevate her legs; and be
 4 limited in her ability to kneel, crawl, and balance. She further
 5 checked the form to indicate Allen would have problems "seeing,
 6 hearing or speaking."⁸ (*Id.*) She opined Allen would be absent
 7 from work due to her impairments "[m]ore than three times a month."
 8 (*Id.*)

9 Both the July 3, 2010, "Verification of Disability," and the
 10 July 27, 2010, medical source statement were considered by the
 11 Appeals Council, which found the evidence did not warrant further
 12 review of the ALJ's decision. (A.R. 1)

13

14 ***B. Vocational Expert's Testimony***

15 The VE described Allen's past relevant work as "grocery store
 16 cashier clerk," which is light, semi-skilled work with an SVP of
 17 3.⁹ During part of her working career, she was a head cashier,
 18 which would still be semi-skilled, but with an SVP of 4.¹⁰

19
 20 ⁸This notation is not explained, and nothing like it appears
 elsewhere in the Record.

21 ⁹"SVP" refers to the level of "specific vocational prepara-
 22 tion" required to perform certain jobs, according to the *Dictionary*
 23 of *Occupational Titles*. The SVP "is defined as the amount of
 24 lapsed time required by a typical worker to learn the techniques,
 25 acquire the information, and develop the facility needed for
 26 average performance in a specific job-worker situation." *Davis v.*
Astrue, slip op., 2011 WL 6152870, at *9 n.7 (D. Or. Dec. 7, 2011)
 27 (Simon, J.) (citation omitted). "The DOT identifies jobs with an
 SVP level of 1 or 2 as unskilled, jobs with an SVP of 3 or 4 as
 semi-skilled, and jobs with an SVP of 5 or higher as skilled." *Whitney v. Astrue*, slip op., 2012 WL 712985, at *3 (D. Or. Mar. 1,
 2012) (Brown, J.) (citing SSR 00-4p).

28 ¹⁰*Id.*

1 The ALJ asked the VE to consider an individual "with
2 demonstrated exertional impairments reflecting a residual
3 functional capacity such as that found [by Dr. Alley, a records-
4 reviewing doctor; see A.R. 262-69, discussed *supra* at page 9]."
5 (A.R. 56) The VE stated such an individual could not return to
6 Allen's past work. (*Id.*) However, the individual could perform
7 other light work, both skilled and unskilled, that exists in
8 significant numbers in the national economy. The VE gave examples
9 of information clerk, a sedentary job with an SVP level of 2;
10 credit card clerk, "a call center application," a sedentary job
11 with an SVP level of 2; self-service cashier, an unskilled, light
12 job with an SVP level of 2; and electronics worker, a light job
13 with an SVP level of 2. (A.R. 57)

14 The VE stated if the individual would be absent from the
15 workplace at unpredictable times, as much as four to eight hours a
16 week, then the individual would not be able to do any type of
17 gainful employment. (A.R. 58)

C. Allen's Testimony

1. Hearing testimony

Allen stated she played basketball at Portland State University in 1979. At that time, she weighed 130 pounds. She is 5'3" tall, and at the time of the ALJ hearing, she weighed 348 pounds. She took steroids during her freshman year at PSU "because of [her] lupus," and this caused her to begin gaining weight. (A.R. 32) Her weight gain has continued since that time, and poses problems for her. She stated the last year she worked, she had to do a lot of bending, which was difficult due to her weight.

1 Allen belonged to a grocery employees' union for nineteen
2 years. Her last job was as head cashier at Fred Meyer, where she
3 worked for almost six years. (A.R. 33-34) She began having
4 problems with high blood pressure, and breathing problems due to
5 congestive heart failure, especially from repeated bending down.
6 (A.R. 34) She eventually "started cheating," by putting a grocery
7 bag into a cart, and filling the bag in the cart so she could avoid
8 having to lift a full bag. She stated this was against Fred
9 Meyer's policy. (A.R. 50-51) She also asked customers to leave
10 items in their carts so she could use the scanning 'gun,' rather
11 than lifting the items from the conveyor belt. (A.R. 51)

12 She did not tell her boss about her health problems "because
13 [she] was head cashier and [her] attendance was important to
14 [her]." (A.R. 34) In June 2007, she had high blood pressure and
15 some problems with her eyesight, and she was getting headaches.
16 She was terminated by Fred Meyer, apparently for failing to show up
17 at work without notifying her employer during the time she was ill.
18 The record is not entirely clear on the reason the employer cited
19 for her termination. She filed some type of wrongful termination
20 action with "Foley Bureau of Labor," and ultimately reached a
21 settlement with Fred Meyer for her back wages. She wanted to be
22 reinstated so she would still have insurance, but the settlement
23 did not include reinstatement. She applied for unemployment, which
24 Frey Meyer contested, but she ultimately prevailed and was able to
25 receive unemployment compensation. (A.R. 34-38) Allen stated that
26 if Fred Meyer had reinstated her, she had planned to use her
27 accumulated sick leave, and when it ran out, go on disability
28 because of her health. (A.R. 39)

1 Allen was still receiving unemployment compensation at the
2 time of the hearing. She complied with the job-search requirement
3 by applying for jobs online. However, according to her, when she
4 explained her medical history, no one wanted to hire her. (A.R.
5 42; see A.R. 40-42, 47)

6 Allen had a splenectomy in approximately 2002, when she was
7 diagnosed with lupus. (A.R. 43) She also was having breathing
8 problems at that time. She stated she is a smoker, and she smoked
9 when she was playing basketball in college. By the time of the ALJ
10 hearing, she was smoking about a third of a pack of cigarettes a
11 day. (A.R. 44)

12 In January 2009, Allen went to Las Vegas for her birthday.
13 While there, she developed pancreatitis and had surgery. During
14 that time period, she was using a patch to try to quit smoking, but
15 the pills and patches were too expensive for her without insurance.
16 (A.R. 44-45) She had just been admitted into the Oregon Health
17 Plan to pay for a portion of her doctors' visits, but she still had
18 to pay 100% of her prescription medications. (A.R. 45-46)

19 Allen stated due to pain in her knees, she could not do a job
20 where she had to sit or stand all day long. Sitting at the ALJ
21 hearing caused her to have knee pain. Her shortness of breath also
22 is a problem for her. in addition, she stated her pain medication
23 (Vicodin, at the time of the hearing) causes problems with her
24 attention and concentration. She stated she has taken pain
25 medication every day for seven years. (A.R. 48-50)

26 Allen stated her doctors have told her that if she lost
27 weight, it would help her high blood pressure. She swims almost
28 every day for exercise. (A.R. 50) She walks very little, noting

1 that just the walk from the elevator to the hearing room caused her
2 to be short of breath. If she has to do a task such as washing
3 dishes, she rests frequently during the task, leaning on the sink
4 or the counter. She spends a lot of time during the day lying
5 down, which she stated relieves her pain at least from a
6 psychological standpoint because she knows that when she is
7 standing, she is in pain. (A.R. 52-53) The continuing decline in
8 her health scares her. (A.R. 54) She isolates herself from other
9 people. Allen stated she would seek psychiatric help if she had
10 insurance, but she cannot afford it. (A.R. 54)

11

12 **2. Written testimony**

13 On August 21, 2007, Allen submitted a Function Report-Adult.
14 (A.R. 158-65) Allen stated she lived alone in an apartment. She
15 described her daily activities as follows: "I fix breakfast, sit in
16 my recliner[,] watch TV[,] fix lunch[,] watch TV, fix dinner then
17 bed. I do take a shower. I can no[t] sit in tub." (A.R. 158)
18 She indicated she cares for her cat by providing food and water.
19 She used to be able to "do a lot of walking or standing," and clean
20 her house, but she is unable to do these things now. Her leg pain
21 sometimes keeps her awake at night. Her knees ache, and she has
22 difficulty putting on pants. She is unable to sit in a tub because
23 she cannot get out. She has trouble rising from the toilet without
24 assistance. She is able to feed herself and care for her personal
25 hygiene needs. (*Id.*)

26 Allen stated she prepares meals such as "salads, soups,
27 sandwiches, hot dogs, bake[d] potatoes [and] items [she] can cook
28 in [the] microwave." (A.R. 160) She uses the microwave "daily,"

1 indicating she is unable to stand over a stove, or "do a lot of
2 chopping." (*Id.*) She does her own laundry, but one load takes her
3 half a day. She has problems taking out the trash because it
4 involves going down stairs. She gets out of breath when she does
5 the laundry or takes out the trash. (*Id.*) She avoids doing
6 housework because she gets depressed, knowing her knees will hurt
7 when she is through. She does not go out except to the grocery
8 store, which she does once or twice a month with the assistance of
9 her daughter or a friend. (A.R. 161) She is able to manage her
10 own money, but needs help "getting bills paid at their location."
11 (A.R. 161-62)

12 Allen spends her time watching television, sleeping, and
13 eating. She stated sleeping and sitting keep the pressure off of
14 her legs and knees. She is "unable to walk, stand, for long
15 periods," and she has trouble sleeping at times due to pain. She
16 occasionally goes to her sister's house, but generally leaves her
17 home only once or twice a month to pay bills or buy groceries.
18 (A.R. 162)

19 Regarding her functional abilities, Allen indicated lifting
20 hurts her legs and knees. She stated, "I can't squat at all
21 because my knees wont' let me. Bending hurts my back if I bend
22 over and over. Standing hurt[s] my knees and lower back. Walking
23 for some time hurts my knees and my breathing is short. Sitting
24 hurt[s] my knees. Stair climb takes my breath away and hurt[s] my
25 knees." (A.R. 163) Allen indicated she has no mental problems.
26 She follows written and spoken instructions very well, and gets
27 along well with authority figures. She handles changes in routine
28 well, but she experiences stress if her blood pressure rises. She

1 has noticed some (unspecified) changes in her behavior due to her
2 pain medication. Allen wears glasses with prescription lenses.
3 (A.R. 164)

4 Allen also completed a Pain Questionnaire in connection with
5 her applications. (A.R. 166-68) She stated she has pain in her
6 knees, legs, hips, back, and chest. The pain is present
7 constantly. Her pain is worse if she walks, bends, steps, or
8 kneels, or when she has no pain medication. If she sits or bends,
9 she has difficulty getting up. The only thing that helps her pain
10 is medication, and she takes Tylenol #3, oxycontin, and Percocet.
11 (A.R. 166-67) The medications make her drowsy and dizzy, give her
12 a dry mouth, and cause her to sleep for long periods. (A.R. 167)
13 She can be active for only about an hour at a time before she has
14 to rest. She is unable to finish house cleaning tasks all at one
15 time. (*Id.*) She stated her daughter helps her with household
16 tasks, indicating, "My daughter has been my legs. She helps me
17 considerably." (A.R. 168)

18 Allen stated she used to play college basketball, run, and
19 jump, but she is no longer able to do these activities. (A.R. 167)
20 She no longer engages in hobbies due to pain in her legs, knees,
21 and back. (A.R. 168)

22 Allen completed a Work History Report. She indicated she
23 worked for Fred Meyer from November 2001 to June 2007. She was
24 Head Cashier, and worked forty hours per week. The job required
25 her to lift groceries, including forty-to-fifty-pound bags of dog
26 food and other heavy items. She spent almost all of her time on
27 her feet in the job. (A.R. 171-72)

28

1 From 1997 to 2001, Allen worked forty hours a week providing
2 in-home care for individuals through an aging and disability
3 service. She assisted clients, administering medications, giving
4 baths, fixing meals, and the like. She assisted clients in going
5 to the restroom, taking showers, and changing bandages. The job
6 required her to lift only about ten pounds. She spent the majority
7 of her time on her feet, with some kneeling, reaching, grasping,
8 and handling tasks. (A.R. 171, 173)

9 From 1989 to 1995, Allen worked about ten hours a week as a
10 cashier at a grocery store. She checked and bagged groceries, and
11 unloaded produce. She was required to lift up to fifty pounds
12 occasionally, and twenty-five pounds frequently. (A.R. 171, 174)

13 At the time Allen appealed the ALJ's decision to the Appeals
14 Council, a "Disability Report-Appeal" was completed by the Social
15 Security Administration, presumably from an interview with Allen.
16 (A.R. 194-200) Allen indicated her condition had gotten worse, and
17 she was going to the ER at least once a month. She stated, "My
18 condition is worse because I can't afford my medications so I have
19 more joint pain. I can't walk up and down the stairs. I have a
20 hard time getting out of bed due to painful joints and knees. I
21 have knee swelling and it makes it hard to move to do my [c]hores
22 or take care of myself [sic]. I can't move my legs. My blood
23 pressure is over 200 or higher." (A.R. 194) Allen had moved in
24 with a friend because she had become unable to take care of her
25 apartment. She indicated she could not do any shopping, household
26 chores, laundry, cooking, or cleaning. She was still able to care
27 for her personal hygiene. She stated, "It [is] hard for me to bend
28 my knees [because] they don't bend well and I don['t] feel like my

1 legs can hold my weight when I go up and dow[n] the stairs." (A.R.
 2 198) She was living in an upstairs apartment, and because of her
 3 difficulty with stairs, she stated she was "homebound," except when
 4 she had doctors' appointments. (*Id.*)

5

6 ***III. DISABILITY DETERMINATION AND THE BURDEN OF PROOF***

7 **A. Legal Standards**

8 A claimant is disabled if he or she is unable to "engage in
 9 any substantial gainful activity by reason of any medically
 10 determinable physical or mental impairment which . . . has lasted
 11 or can be expected to last for a continuous period of not less than
 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

13 "Social Security Regulations set out a five-step sequential
 14 process for determining whether an applicant is disabled within the
 15 meaning of the Social Security Act." *Keyser v. Commissioner*, 648
 16 F.3d 721, 724 (9th Cir. 2011) (citing 20 C.F.R. § 404.1520). The
 17 Keyser court described the five steps in the process as follows:

- 18 (1) Is the claimant presently working in a
 19 substantially gainful activity? (2) Is the
 20 claimant's impairment severe? (3) Does the
 21 impairment meet or equal one of a list of
 22 specific impairments described in the regula-
 23 tions? (4) Is the claimant able to perform
 24 any work that he or she has done in the past?
 25 and (5) Are there significant numbers of jobs
 26 in the national economy that the claimant can
 27 perform?

28 *Keyser*, 648 F.3d at 724-25 (citing *Tackett v. Apfel*, 180 F.3d 1094,
 29 1098-99 (9th Cir. 1999)); see *Bustamante v. Massanari*, 262 F.3d
 30 949, 953-54 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1520 (b)-(f)
 31 and 416.920 (b)-(f)). The claimant bears the burden of proof for
 32 the first four steps in the process. If the claimant fails to meet

1 the burden at any of those four steps, then the claimant is not
 2 disabled. *Bustamante*, 262 F.3d at 953-54; see *Bowen v. Yuckert*,
 3 482 U.S. 137, 140-41, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119
 4 (1987); 20 C.F.R. §§ 404.1520(g) and 416.920(g) (setting forth
 5 general standards for evaluating disability), 404.1566 and 416.966
 6 (describing "work which exists in the national economy"), and
 7 416.960(c) (discussing how a claimant's vocational background
 8 figures into the disability determination).

9 The Commissioner bears the burden of proof at step five of the
 10 process, where the Commissioner must show the claimant can perform
 11 other work that exists in significant numbers in the national
 12 economy, "taking into consideration the claimant's residual
 13 functional capacity, age, education, and work experience." *Tackett*
 14 v. *Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner
 15 fails meet this burden, then the claimant is disabled, but if the
 16 Commissioner proves the claimant is able to perform other work
 17 which exists in the national economy, then the claimant is not
 18 disabled. *Bustamante*, 262 F.3d at 954 (citing 20 C.F.R.
 19 §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1098-99).

20 The ALJ determines the credibility of the medical testimony
 21 and also resolves any conflicts in the evidence. *Batson v. Comm'r*
 22 of Soc. Sec. Admin.

., 359 F.3d 1190, 1196 (9th Cir. 2004) (citing
 23 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)).
 24 Ordinarily, the ALJ must give greater weight to the opinions of
 25 treating physicians, but the ALJ may disregard treating physicians'
 26 opinions where they are "conclusory, brief, and unsupported by the
 27 record as a whole, . . . or by objective medical findings." *Id.*
 28 (citing *Matney*, *supra*; *Tonapetyan v. Halter*, 242 F.3d 1144, 1149

1 (9th Cir. 2001)). If the ALJ disregards a treating physician's
 2 opinions, "'the ALJ must give specific, legitimate reasons'" for
 3 doing so. *Id.* (quoting *Matney*).

4 The law regarding the weight to be given to the opinions of
 5 treating physicians is well established. "The opinions of treating
 6 physicians are given greater weight than those of examining but
 7 non-treating physicians or physicians who only review the record."
 8 *Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1036 (9th Cir.
 9 2003). The *Benton* court quoted with approval from *Lester v.*
 10 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995), where the court held as
 11 follows:

12 "As a general rule, more weight should be
 13 given to the opinion of a treating source than
 14 to the opinion of doctors who do not treat the
 15 claimant. At least where the treating
 16 doctor's opinion is not contradicted by
 17 another doctor, it may be rejected only for
 18 'clear and convincing' reasons. We have also
 19 held that 'clear and convincing' reasons are
 required to reject the treating doctor's
 ultimate conclusions. Even if the treating
 doctor's opinion is contradicted by another
 doctor, the Commissioner may not reject this
 opinion without providing 'specific and legi-
 timate reasons' supported by substantial
 evidence in the record for so doing."

20 *Id.* (quoting *Lester*, *supra*).

21 The ALJ also determines the credibility of the claimant's
 22 testimony regarding his or her symptoms:

23 In deciding whether to admit a claimant's sub-
 24 jective symptom testimony, the ALJ must engage
 25 in a two-step analysis. *Smolen v. Chater*, 80
 26 F.3d 1273, 1281 (9th Cir. 1996). Under the
 27 first step prescribed by *Smolen*, . . . the
 28 claimant must produce objective medical
 evidence of underlying "impairment," and must
 show that the impairment, or a combination of
 impairments, "could reasonably be expected to
 produce pain or other symptoms." *Id.* at 1281-
 82. If this . . . test is satisfied, and if

1 the ALJ's credibility analysis of the
 2 claimant's testimony shows no malingering,
 3 then the ALJ may reject the claimant's testi-
 4 mony about severity of symptoms [only] with
 5 "specific findings stating clear and con-
 6 vincing reasons for doing so." *Id.* at 1284.
 7

8 *Batson*, 359 F.3d at 1196.

7 ***B. The ALJ's Decision***

8 The ALJ found Allen has not engaged in substantial gainful
 9 activity since her alleged onset date of June 9, 2007. He found
 10 her to have severe impairments consisting of "obesity and
 11 patellofemoral syndrome," but he further found these impairments,
 12 singly or in combination, do not meet or equal a Listed impairment.
 13 (A.R. 13) The ALJ noted that although obesity is no longer a
 14 listed impairment in the regulations, he nevertheless factored in
 15 Allen's obesity in his assessment, and even if obesity were added
 16 to her impairments, the combination of her impairments still would
 17 not meet or medically equal a listed impairment. (A.R. 13-14)

18 The ALJ found Allen has the residual functional capacity to
 19 perform light work, with the following limitations:

20 [L]imited to standing and/or walking for no more
 21 than two of eight workday hours, sitting for about
 22 six of eight workday hours, and lifting and/or
 23 carrying should be restricted to twenty pounds
 24 frequently and ten pounds occasionally. Also,
 25 [she] should only occasionally climb ramp/stairs,
 but should never climb ladder/rope/scaffolds.
 Additionally, [she] should be restricted to per-
 forming tasks requiring no more than occasional
 balancing, stooping, kneeling, crouching, and
 crawling.

26 (A.R. 14)

27 In reaching his RFC assessment, the ALJ indicated he had
 28 considered all of Allen's alleged symptoms and resulting

1 limitations. He found Allen's subjective complaints regarding the
2 intensity, persistence, and limiting effects of her symptoms to be
3 credible only insofar as they are consistent with the ALJ's RFC
4 assessment. (A.R. 14-15) Specifically, the ALJ found that
5 although Allen "suffers from some type of impairment," her claim
6 that she is incapable of all types of work activity is unconvincing
7 "as the evidence in the record reflects [Allen's] functional
8 limitations are not as significant and limiting as have been
9 alleged." (A.R. 15)

10 As support for his credibility finding, the ALJ noted Allen
11 lives alone and does not require assistance caring for her personal
12 needs or self-care. She "prepares daily meals, performs housework,
13 takes care of a cat, does her own shopping, and when she goes out
14 she can do so alone, either driving, taking public transportation,
15 or walking." (*Id.*) He noted that although Allen claims she tires
16 easily after walking for ten minutes, she "testified that she
17 exercises regularly, doing water aerobics daily, which is also
18 supported by her medical record[.]" (*Id.*) He noted Allen has no
19 problems getting along with coworkers, supervisors, or the public,
20 or there is no evidence that her ability to communicate clearly,
21 her memory, or her ability to follow instructions has been affected
22 by her impairments. The ALJ concluded that "[c]ollectively, this
23 evidence indicates [Allen's] activities of daily living, social
24 functioning and concentration, persistence and pace, are not
25 limited to the extent one would expect given her complaints of
26 disabling symptoms and limitations, and further suggests [her]
27 alleged impairments do not result in a significant functional
28

1 limitation that precludes her from engaging in basic work
 2 activity." (*Id.*)

3 The ALJ also found it significant that the Record indicates
 4 Allen "stopped working for reasons unrelated to an alleged
 5 impairment." (*Id.*) He noted Allen worked at Fred Meyer for six
 6 years, during which her allegedly-disabling impairments were
 7 present. Allen testified she was terminated for missing work
 8 without giving notice that she would be absent, and she was
 9 terminated for this misconduct. Although she settled an unlawful
 10 termination action, she was not reinstated as she desired. The ALJ
 11 concluded the record evidence "is fairly conclusive by [Allen's]
 12 own admission that her health was not the cause of her unemployment
 13 at the time of her alleged onset date," which corresponded with her
 14 termination date from Fred Meyer. (*Id.*) In addition, Allen has
 15 been receiving unemployment benefits since her termination, "and
 16 has been regularly applying for jobs, suggesting that if [she] is
 17 actively seeking employment, then she must also be capable of
 18 performing work-related tasks." (*Id.*) He noted no doctor had
 19 placed any restrictions on Allen, or had indicated Allen was
 20 disabled.¹¹ Dr. Lyon expressly refused to support Allen's "quest
 21 for disability, stating that based on [her] skills and good
 22 education, she should be able to find work." (A.R. 16)

23 The ALJ further noted Allen has been treated conservatively by
 24 her doctors for her allegedly disabling symptoms, and her trips to
 25 the doctor have been infrequent. (*Id.*) Her hypertension is
 26 controlled by medication when it is taken as directed. Her

27 ¹¹The ALJ did not have Dr. Orsini's records at the time he
 28 prepared his written opinion.

1 shortness of breath is not caused primarily by congestive heart
 2 failure, with the evidence suggesting it may, instead, be caused by
 3 allergies and by her continued smoking. In addition, the ALJ noted
 4 a consulting "rheumatologist" had opined Allen's knee and ankle
 5 pain likely was not attributable to lupus, and questioned whether
 6 that diagnosis even was correct. Instead, the "rheumatologist"
 7 opined her knee and ankle pain likely was due to her obesity and
 8 osteoarthritis.¹² The ALJ concluded, "Collectively, [Allen's]
 9 treatment record suggests her alleged disabling symptoms are not
 10 particularly serious and not as limiting as [she] has alleged in
 11 connection with this application." (*Id.*)

12 Because no treating source had offered an opinion supporting
 13 Allen's "allegations of disabling functional limitations caused by
 14 her various medical conditions," the ALJ relied on the RFC
 15 assessment performed by Dr. Alley, and gave his opinion
 16 "significant weight." (A.R. 16-17) The ALJ noted, "Although
 17 Dr. Alley was not an examining physician, his opinion is generally
 18 consistent with the evidentiary record and was supported by a
 19 critical evaluation of the medical evidence and the medical source
 20 statements in the record." (A.R. 17) The ALJ stated that in
 21 formulating his RFC assessment, he had given Allen "the maximum
 22 reasonable benefit of the doubt," but "the preponderance of the
 23

24
 25 ¹²The exhibit cited by the ALJ in support of this finding is
 26 the office notes of NP Probst, not to any consultation by a
 27 rheumatologist. The Commissioner also argues Allen's "rheumatology
 28 specialist expressed uncertainty" about the lupus diagnosis. Dkt. #19, p. 8. Allen was not seen by a rheumatologist for consultation, only by the nurse practitioner, and it was NP Probst who offered this opinion. (See A.R. 234-37)

1 medical evidence fails to support the contention that [she] can do
 2 no work at all." (*Id.*)

3 The ALJ found Allen is unable to perform her past relevant
 4 work, but at her age, and with her education, work experience, and
 5 RFC, she can perform unskilled sedentary and light work that exists
 6 in substantial numbers in the national economy. He relied on the
 7 VE's testimony in concluding Allen can make a successful adjustment
 8 to work in that range, giving examples of information clerk, credit
 9 card clerk, self-service cashier, and electronics worker. (A.R.
 10 18) He therefore concluded Allen had not been under a disability
 11 from June 9, 2007, through January 14, 2010. (A.R. 18-19)

IV. STANDARD OF REVIEW

14 The court may set aside a denial of benefits only if the
 15 Commissioner's findings are "'not supported by substantial evidence
 16 or [are] based on legal error.'" *Bray v. Comm'r of Soc. Sec.*
17 Admin., 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v.*
18 Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)); accord *Black*
19 V. Comm'r of Soc. Sec. Admin., slip op., 2011 WL 1930418, at *1
 20 (9th Cir. May 20, 2011). Substantial evidence is '"more than a
 21 mere scintilla but less than a preponderance; it is such relevant
 22 evidence as a reasonable mind might accept as adequate to support
 23 a conclusion.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035,
 24 1039 (9th Cir. 1995)).

25 The court "cannot affirm the Commissioner's decision 'simply
 26 by isolating a specific quantum of supporting evidence.'" *Holohan*
27 v. Massanari, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett*
28 v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1998)). Instead, the court

must consider the entire record, weighing both the evidence that supports the Commissioner's conclusions, and the evidence that detracts from those conclusions. *Id.* However, if the evidence as a whole can support more than one rational interpretation, the ALJ's decision must be upheld; the court may not substitute its judgment for the ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

V. DISCUSSION

Allen argues the ALJ misstated the evidence in several respects. First, she disputes the ALJ's findings regarding her functional abilities. The ALJ stated Allen "has reported she lives by herself and does not report needing any particular assistance taking care of her personal needs or self-care. [She] has stated she prepares daily meals, performs housework, takes care of a cat, does her own shopping, and when she goes out she can do so alone, either driving, taking public transportation or walking." (A.R. 15) Allen argues she "maintains an apartment, but lives with a friend who has an adult foster care home . . . where she has her own room due to her inability to perform [activities of daily living]." Dkt. #18, ECF p. 6 (emphasis in original). She also asserts that in stating she can "shop alone," she "failed to expound that 'shopping alone' includes the use of her handicap parking sticker for close parking, the use of a walker . . . , a mobility cart while in the store, and assistance from a store employee for reaching while shopping and loading the groceries into the car." Dkt. #18, ECF p. 6. In support of her arguments, Allen cites the Disability Report-Appeal prepared by the Agency at some

1 point following the initial and reconsideration denials of her
2 applications for benefits (A.R. 198), as well as additional
3 exhibits submitted by Allen with her initial and reply briefs, Dkt.
4 ##18 & 23.

5 With regard to the ALJ's finding that Allen "has reported"
6 living alone and not needing assistance to care for herself, the
7 court notes Allen made those representations at the time of her
8 initial applications for benefits. See A.R. 158-59. When Allen
9 made the statements reported on the Disability Report-Appeal, she
10 indicated she had moved in with a friend because she was unable to
11 take care of her apartment. She indicated her roommate did all of
12 "the shopping, household chores, laundry, cooking and cleaning,"
13 and all Allen was able to do was care for her personal hygiene
14 needs. (A.R. 198)

15 The Disability Report-Appeal is not dated or signed, and it is
16 difficult to determine when it was submitted to the Agency. On the
17 form, Allen indicated her last doctor's visit was in April 2008,
18 when she was seen for "joint pain and chest pain," treated in the
19 ER with "medication and xrays." (A.R. 196) However, the Record
20 contains no treatment notes from an ER visit in April 2008.
21 Indeed, Allen indicated she was going to the ER at least once a
22 month, but there are no ER records at all from this time period.
23 Similarly, the form shows a visit to the Old Town Clinic in March
24 2008, for shortness of breath and congestive heart failure, when
25 Allen was treated with "medication for heart." (*Id.*) Again, no
26 treatment notes appear in the Record for a doctor's visit in March
27 2008. Because the Record contains treatment and progress records
28 from February 2008, and then from August 2008, through at least

1 November 2009, it would appear the form was submitted sometime
 2 between February and August 2008. In that case, the ALJ would have
 3 had the benefit of the form at the time he made his decision, yet
 4 he did not discuss Allen's representations shown on the form, and
 5 made a finding that Allen was living alone with minimal assistance.
 6 This oversight is troubling. If the ALJ discredited Allen's
 7 updated complaints, he was required to provide clear and convincing
 8 reasons for doing so (absent evidence of malingering, which is not
 9 clearly present in this case¹³). See *Dodrill v. Shalala*, 12 F.3d
 10 915, 918 (9th Cir. 1993). The ALJ's findings must be "sufficiently
 11 specific to permit the reviewing court to conclude that the ALJ did
 12 not arbitrarily discredit the claimant's testimony." *Orteza v.*
 13 *Shalala*, 50 F.3d 748, 750 (9th Cir. 1995). If, on the other hand,
 14 the form was not part of the Record before the ALJ, then it should
 15 have been considered by the Appeals Council, but it does not appear
 16 on the list of additional evidence the Appeals Council considered.
 17 (See A.R. 4)

18 The court finds the Agency's failure to address Allen's
 19 updated complaints was error. Her change in circumstances, coupled
 20 with the medical source statement from Dr. Orsini, her new treating
 21 physician, indicate her condition had deteriorated significantly
 22 since the time of the ALJ hearing, which could impact the ultimate
 23

24
 25 ¹³Although records-review consultant Dr. Alley did not
 26 expressly state Allen was malingering, he found the level of
 27 disability she alleged was "not supported by objective evidence."
 28 A.R. 269; see A.R. 270 (Dr. Berner's statement concurring with
 Dr. Alley's "opinion and credibility assessments"); A.R. 271
 (Dr. Farwell's statement concurring with Dr. Alley's RFC
 determination).

1 determination regarding whether or not she is disabled as of some
 2 date.

3 Allen has submitted new evidence she asks the court to
 4 consider, consisting of the following:¹⁴

5 (1) A statement authored by Dr. Orsini on January 11, 2011,
 6 stating Allen suffers from "severe osteoarthritis of her knees"
 7 that causes chronic pain, and makes it difficult for Allen to walk
 8 or sit for long periods of time; congestive heart failure;
 9 diabetes; hypertension; and lupus; all of which "make it impossible
 10 for her to maintain gainful employment." Dkt. #18-1, p. 2.

11 (2) A "Physician's Questionnaire for Verification of
 12 Disability for the Oregon Retail Employees Pension Trust[]," dated
 13 September 14, 2010, on which Dr. Orsini indicated she had seen
 14 Allen approximately monthly since December 1, 2009. The doctor
 15 stated Allen has irreversible congestive heart failure, and
 16 incurable systemic lupus. She indicated Allen cannot afford knee
 17 replacement surgery (although the court notes the Record contains
 18 no recommendations that she obtain such surgery), and she is
 19 "unable to walk without a walker, unable to stand or walk for
 20 extended periods of time, unable to sit for extended periods of
 21 time without significant pain, has not been able to support herself
 22 for past 3 years adequately due to many medical issues causing her
 23 to loose [sic] employment." Dkt. #18-2, p. 2. The doctor opined

24

25 ¹⁴Two of the documents submitted by Allen (i.e., the "Verifi-
 26 cation of Disability" signed by Dr. Orsini on July 3, 2010; and
 27 Dr. Orsini's Medical Source Statement, dated July 27, 2010) were
 28 considered by the Appeals Council (see A.R. 4), and the court has
 discussed that evidence above, in the summary of Allen's medical
 history. Those documents, therefore, do not constitute "new
 evidence," and are not listed here.

1 that Allen's "medical and physical disability make gainful
2 employment at this time impossible for her." *Id.*, p. 3. Dr.
3 Orsini limited Allen to lifting no more than five pounds even
4 occasionally, with only limited walking. She noted Allen might
5 benefit from physical therapy. *Id.*

6 (3) A letter from the Oregon Retail Employees Pension Trust
7 to Allen dated October 11, 2010, discussing her monthly pension
8 payments. Dkt. #18-2, p. 4.

9 (4) A statement authored by Dr. Orsini on August 24, 2011,
10 echoing the doctor's January 11, 2011, statement, with further
11 information about the nature of lupus, and indicating Allen's
12 "disability is expected to be permanent." Dkt. #18-3.

13 (5) A handwritten note from Angela R. [illegible surname]
14 dated September 15, 2011, stating: "Carmen Allen was supposed to be
15 a care giver for my foster son. Due to her chronic pain, she could
16 not help and I ended up helping her with all of her ADL's,
17 shopping, laundry - paying her bills and basically helping her out
18 80% of the time due to her pain. I am still helping her out as she
19 is medically disabled." Dkt. #18-4.

20 (6) A printout from Fred Meyer Pharmacy showing prescriptions
21 filled by Allen from January 16 to December 24, 2011. Dkt. #23,
22 p. 11.

23 (7) A printout from an unknown source showing medications
24 prescribed for Allen from March 15, 2008, to December 24, 2011.
25 Dkt. #23, pp. 12-13.

26 (8) A radiology report from x-rays of Allen's knees, dated
27 July 13, 2010, showing bilateral osteoarthritis, with "[m]ild joint
28 space narrowing and mild-to-moderate osteophytosis" on the right,

1 and "[m]ild-to-moderate asymmetric joint space narrowing with
 2 moderate osteophytosis" on the left; "old left medial collateral
 3 ligament tear"; "[l]arge right effusion," with an MRI recommended
 4 "for better evaluation if warranted"; and "[b]one infarct distal
 5 femoral shaft," which also could be evaluated better with an MRI.
 6 Dkt. #8, p. 7.

7 (9) Two letters from Allen's attorney to the Appeals Council
 8 - one dated December 21, 2010, and another dated March 1, 2011 -
 9 written following each of the Appeals Council's decisions, in which
 10 the attorney requests a copy of the Record and an opportunity to
 11 argue or brief the case before a final decision is made. Dkt. #8,
 12 pp. 12 & 13.

13 The Commissioner asks the court to disregard this new evi-
 14 dence, arguing Allen has not met her burden to show the evidence is
 15 material, nor has she shown good cause for failing to submit the
 16 evidence in a timely manner. Dkt. #19, pp. 5-8.

17 The statute providing for judicial review of the Commis-
 18 sioner's final decisions specifies the court "may at any time order
 19 additional evidence to be taken before the Commissioner of Social
 20 Security, but only upon a showing that there is new evidence which
 21 is material and that there is good cause for the failure to
 22 incorporate such evidence into the record in a prior proceeding[.]"
 23 42 U.S.C. § 405(g), sentence six. "To meet the materiality
 24 standard, the 'new or additional evidence offered must bear
 25 directly and substantially on the matter in dispute.'" *Wainwright*
 26 v. Sec'y of Health & Human Servs., 939 F.2d 680, 682 (9th Cir.
 27 1991) (quoting *Ward v. Schweiker*, 686 F.2d 762, 764 (9th Cir.
 28 1982)). Stated differently, "[e]vidence is material if there is a

1 reasonable possibility that such evidence would have changed the
 2 outcome of the case." *Flores v. Sullivan*, 908 F.2d 976 (Table),
 3 1990 WL 102786, at *3 (9th Cir. July 24, 1990) (citing *Booz v.*
 4 *Sec'y of Health & Human Servs.*, 734 F.2d 1378, 1381 (9th Cir.
 5 1984)).

6 Particularly when viewed in conjunction with Dr. Orsini's
 7 medical source statement, the additional evidence Allen has
 8 submitted bears directly and substantially on her case. Although
 9 the new evidence is not dispositive, it reasonably could have
 10 changed the outcome of the case. As such, the court finds the
 11 evidence is material.

12 Allen did not mention, in her brief, any reason for her
 13 failure to submit the new evidence sooner. However, she first
 14 submitted the new evidence by way of a letter, docketed in the case
 15 as a "Supplement" to her Complaint. Dkt. #8. In the letter, she
 16 states the new evidence (obviously excluding the two letters from
 17 her attorney to the Appeals Council) was either overlooked or not
 18 presented by her attorney in the Agency proceedings. *Id.*, p. 1.
 19 Construing Allen's *pro se* filings liberally, the court finds her
 20 attorney's failure to submit the evidence constitutes good cause
 21 justifying its consideration. See *Robertson v. Wells Fargo Home*
 22 *Mortg.*, slip op., 2011 WL 5157772, at *4 (D. Or. Oct. 28, 2011)
 23 (Brown, J.) ("the court must construe *pro se* filings liberally");
 24 *McCabe v. Arave*, 827 F.2d 634, 640 n.6 (9th Cir. 1987) ("[C]ourts
 25 are to make reasonable allowances for *pro se* litigants and to read
 26 *pro se* papers liberally.").

27 In addition, as Judge King of this court has observed, "If the
 28 evidence did not exist prior to the Secretary's final decision,

1 good cause exists for the plaintiff's failure to present the
2 evidence." *Ready v. Astrue*, slip op., 2012 WL 171291, at *6
3 (D. Or. Jan. 20, 2012) (citing *Burton v. Heckler*, 724 F.2d 1415,
4 1418 (9th Cir. 1984)). The Appeals Council initially denied
5 Allen's request for review on October 27, 2010. The new evidence
6 listed in paragraph (2), a portion of the prescription printout in
7 paragraph (6), and the x-ray report in paragraph (8), could have
8 been obtained prior to that time, although it is questionable
9 whether Allen would have known of, and/or had the opportunity to
10 submit, Dr. Orsini's questionnaire listed in paragraph (2) in time
11 for consideration by the Appeals Council. The remaining evidence
12 (again excluding counsel's letters) post-dates the Appeals
13 Council's final decision. Although the Appeals Council later set
14 aside its decision for the purpose of considering Dr. Orsini's July
15 2010 medical source statement, there is no indication in the Record
16 that Allen knew the Appeals Council was taking a second look at her
17 case (despite her attorney's request that the Appeals Council do
18 so, and allow argument or briefing prior to issuing a decision).
19 The court therefore does not fault Allen for failing to submit the
20 remaining new evidence prior to the February 21, 2011, Appeals
21 Council denial.

22 Allen also argues the ALJ erred in rejecting her diagnosis of
23 lupus, and in failing to find lupus is a severe impairment. During
24 the hearing, the ALJ stated the Record contains "no evidence" of
25 Allen's lupus diagnosis, and "most people don't think she really
26 ever had lupus, or if she did, she doesn't have it any longer."
27 (A.R. 30) The ALJ's statement does not reflect the Record
28 accurately. The Record contains the results of a single ANA test,

1 performed on June 25, 2007, that was negative. Nevertheless,
2 Allen's treating physician at the time, Dr. Grace, listed "Lupus
3 Erythematosus-Systemic" as one of Allen's current conditions, by
4 history, with an onset date in 1979. Allen's doctors have treated
5 her inflammation and pain symptoms with narcotic pain relievers for
6 many years, and all of her treating physicians since that time have
7 listed lupus as a diagnosis, by history - albeit apparently without
8 any corroborating laboratory test results. The only individual to
9 question lupus as a diagnosis was consulting Nurse Practitioner
10 Kevin Probst, on August 14, 2007. NP Probst opined Allen's knee
11 and ankle pain could be due to osteoarthritic changes and obesity.
12 (A.R. 235) The opinion of this single nurse practitioner hardly
13 amounts to "most people" not thinking Allen "really ever had
14 lupus." However, the lack of corroboration of the diagnosis
15 reported by Allen, and the lack of current steroid treatments, do
16 raise questions. The ALJ erred in discrediting the ongoing
17 diagnosis of lupus by Allen's treating sources without further
18 investigation or development of the Record.

19 Upon remand, the ALJ should be directed to consider Allen's
20 Disability Report-Appeal, the July 2010 statements from Dr. Orsini,
21 and the new evidence submitted to this court, as well as developing
22 any further evidence that will provide a full and complete Record.
23 Among other things, the ALJ should develop the Record further
24 regarding Allen's lupus diagnosis. See *Hayes v. Astrue*, 270 Fed.
25 Appx. 502, 504 (9th Cir. 2008) ("'In Social Security cases, the ALJ
26 has a special duty to fully and fairly develop the record and to
27 assure that the claimant's interests are considered[.]' . . . even
28

when the claimant is represented by counsel.") (quoting *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) (per curiam)).

VI. CONCLUSION

For the reasons discussed above, I recommend the Commissioner's decision be reversed, and the case be remanded for further proceedings consistent with this opinion.

VII. SCHEDULING ORDER

9 These Findings and Recommendations will be referred to a
10 district judge. Objections, if any, are due by **July 6, 2012**. If
11 no objections are filed, then the Findings and Recommendations will
12 go under advisement on that date. If objections are filed, then
13 any response is due by **July 23, 2012**. By the earlier of the
14 response due date or the date a response is filed, the Findings and
15 Recommendations will go under advisement.

IT IS SO ORDERED.

Dated this 18th day of June, 2012.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge